



March 5, 1992

Note to Doug Black

Re: Self-Governance Authority

This note is to confirm our oral advice regarding the IHS' authority in the area of tribal self-governance planning and to answer your question whether section 103(e)(2) of the Indian Self-Determination Act (Act) would authorize the grant proposed to be awarded to the Cherokee Nation of Oklahoma. In accord with the following limitations, section 103(e)(2) could be used as authority to make a grant to the Cherokee Nation as proposed. Information produced as a result of this grant could be used by the IHS for the study required by section 308 in Title III of the Act.

Title III authorizes a Tribal Self-Governance Demonstration Project. As initially enacted, Title III applied to the Department of Interior and did not authorize the IHS to conduct similar activities. Title III was amended by Pub. L. 102-185, 105 Stat. 1278, to add a new section 308 which requires the IHS to conduct a study on the feasibility of extending the self-governance project to IHS activities. Although the Conference Report which accompanied the IHS' fiscal year 1992 appropriation directs the IHS to conduct additional self-governance planning activities, Title III was not amended to give the IHS the same specific authorities in this area as were given to the Department of the Interior initially. The IHS may, of course, conduct additional self-governance planning activities internally pursuant to its general authority under the Snyder Act. However, in order to make grants to tribes for their own planning activities, the IHS must have specific authority authorizing such an assistance relationship. As set out in a Memorandum Opinion of this office dated February 27, 1991 (attached), it is our view that section 308 does not authorize an assistance relationship. Against this background, you have asked whether section 103(e)(2) in Title I of the Act would authorize the grant proposed to be awarded to the Cherokee Nation of Oklahoma in connection with the IHS' self-governance planning activities.

Section 103(e)(2) provides as follows:

The Secretary is authorized, upon the request of an Indian tribe, to make a grant to any tribal organization for --

(2) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe, including Federal administrative functions.

The Senate Report which accompanied the 1988 amendments to the Act comments on section 103(e)(2) as follows:

The new Section 103(e)(2) would enable tribes to conduct functional analysis of operations and responsibilities and to develop reorganization plans for Federal agencies serving the tribes including Area Offices, Field Offices, Agency Offices and Service Units. Obtaining a grant to conduct such planning, designing, monitoring and evaluation of Federal programs, while obviously helpful to such tribes, is not [] a precondition for tribes to conduct such analyses or to develop such plans. A fundamental premise of the Self-Determination Act is that self-determination involves more than just contracting. Tribes also have the right not to contract. Instead, tribes may participate with Federal agencies in cooperative, joint planning efforts to determine the manner in which those Federal agencies may better deliver federally-operated services to such tribes.

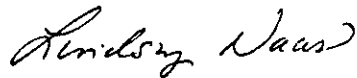
S. Rep. No. 274, 100th Cong. 1st Sess. 28 (1988).

This authority can be used to make a grant to the Cherokee Nation for the purposes set forth above. In our view, section 103(e)(2) does not provide authority to make a grant to a tribe for self-governance planning purposes. This is because, as a general rule, a specific statute or provision controls and must be used to the exclusion of a more general authority that, without the more specific provision, might be read to apply. See Morton v. Mancari, 94 S.Ct. 2474, 2483 (1974) citing Bulova Watch Co. v. United States, 81 S.Ct. 864 (1961); Rodgers v. United States, 22 S.Ct. 582, 583-584 (1902). Here, a tribal self-governance demonstration project is specifically authorized by Title III; Title III gives the Department of the Interior authority to make planning grants and does not give the IHS similar authority to make grants. Where the IHS was not given grant authority in this particular area in which Congress has specifically addressed both grant authority and the IHS' involvement, the IHS cannot rely on a more general grant authority to award a grant that the more specific provision does not authorize.

However, a scope of work for the proposed grant can most likely be tailored to fit the purposes of section 103(e)(2) while at the same time producing information which the IHS can use for the study it is required to conduct under Title III of the Act. We recommend that the scope of work not expressly include self-governance planning activities, as such, because as set out above, self-governance planning grants are specifically addressed in Title III and, section 103(e)(2) does not expressly include such activities in its enumerated purposes.

The IHS may use funds from its lump sum appropriation for grants awarded under section 103(e)(2). Although the \$500,000 earmarked in the Conference Report similarly must have been set aside out of the lump sum appropriation, the IHS may not want to specifically associate those earmarked funds with the grant awarded pursuant to section 103(e)(2) as it may draw into question the use of section 103 for tribal self-governance planning grants which the IHS is not authorized to make under Title III.

Please feel free to call if you have any additional questions regarding the IHS' authority in this area or you would like us to review the proposed scope of work or the report to the committees.



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Attachment

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